



METROPOLITAN
TRANSPORTATION
COMMISSION

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Memorandum

Agenda Item 3

TO: Operations Committee

DATE: April 4, 2014

FR: Executive Director

W. I. 105-1221, 310-2700

RE: Clipper® Contract Claims Settlement – Clipper® Phase 3 Operating Costs, Uncollected Autoload Value, Credit/Debit Card Chargebacks, and Resolution of \$2,000,000 Credit from Assignment of Contract in 2009: Cubic Transportation Systems, Inc. (TBD)

Four disputes have arisen between MTC and the Clipper® Contractor, Cubic Transportation Systems, Inc. (Cubic), pertaining to provisions of the Clipper® Contract. MTC staff and Cubic representatives have reached an agreement to settle these disputes, subject to the approval of this Committee.

Overview of Contract Claims and Recommended Resolution for Each

1. Clipper® Phase 3 Operating Costs. Cubic protested the contract change order directing expansion of Clipper® to the first Phase 3 operator and submitted a claim requesting additional compensation for certain fixed operations and maintenance (“O&M”) fees with respect to the Clipper® Phase 3 expansion. MTC denied the claim, primarily because O&M payments initiated in 2006 covered all transit operators then named in the contract, including those listed in Attachment 7(4) of the Clipper® Contract as Phase 3 operators. Based on Cubic’s cost proposals to MTC, the value of this claim is approximately \$1,000,000 per year. Under the recommended settlement, Cubic agrees to withdraw its claim for additional compensation for O&M services related to the system’s expansion to those Phase 3 transit agencies listed in the Clipper® Contract.

2. Uncollected Autoload Value. As background, Clipper® customers can enable “Autoload” for their cards. Autoload-enabled cards will have transit value added automatically, either when the balance falls below \$10 or at the start of every month, with a corresponding charge to the customer’s credit or debit card. Some Clipper® customers were not charged for Autoload transactions during the period from September 2010 to August 2011. These uncollected Autoload funds totaled approximately \$229,000. Cubic undertook efforts to collect the funds from February through July 2012, but there was a \$102,664 gap in recovery as a result of outdated customer payment information. Cubic asserted that the uncollected funds were consequential damages for which it was not responsible under the Clipper® Contract, while MTC claimed that the lost funds were direct damages from Cubic’s failure to perform.

Under the recommended settlement, Cubic agrees to pay MTC the full \$102,664 of lost fare revenue from the uncollected Autoload transactions. However, the settlement would not address whether future uncollected revenue would constitute consequential or direct damages.

3. Credit/Debit Card Chargebacks. A customer using a debit or credit card for Clipper® purchases may initiate a “chargeback” by disputing a Clipper® charge with the bank. In such cases, the Clipper® program must return the disputed amount to the credit or debit card bank but can contest the chargeback within the timeframe established by the bank.

Under the Clipper[®] Contract, Cubic receives an administrative fee of 10% of credit/debit interchange fees and bank fees. MTC and the transit operators asserted that Cubic is responsible for reimbursing the Clipper[®] program for the fare revenue lost to chargebacks as part of this 10% fee. Cubic asserted that it is not obligated to replace the fare revenue lost to chargebacks, because the uncollected funds are consequential damages and because the 10% fee covers only the responsibility to contest and attempt to recover the chargebacks. MTC further asserted that Cubic did not adequately discharge its duty to contest chargebacks from November 2010 to May 2011, because Cubic did not timely contest chargebacks totaling \$238,000 during that timeframe.

Under the recommended settlement, Cubic agrees to pay MTC \$17,000 for the uncontested customer chargeback transactions that occurred between November 2010 and May 2011. This amount represents the expected value that Cubic would have recovered had it timely contested the chargebacks. Further, MTC and Cubic agree to enter into a change order to the Clipper[®] Contract that defines “chargebacks”, specifies Cubic’s responsibilities for contesting chargebacks, and provides that Cubic will not be responsible for future lost fare revenue related to chargebacks, as long as Cubic is carrying out the specified responsibilities.

It is important to note that, although not part of the settlement with Cubic, the transit operators have agreed with MTC to assume primary responsibility for lost revenue due to customer chargebacks starting in FY 2013-14 (approximately \$180,000 per year.) The Clipper[®] program has absorbed the transit revenue-related costs of chargebacks for prior fiscal years (totaling approximately \$900,000) as a Clipper[®] program operating expense.

4. Resolution of \$2,000,000 Credit from Assignment of Contract in 2009. At the time of assignment to Cubic of the Clipper[®] Contract, Cubic agreed to provide MTC with a \$2,000,000 credit to be applied to offset the cost of a project integrating Clipper[®] with BART parking. The Clipper[®]/BART parking integration is unlikely to move forward before the termination of the Clipper[®] Contract in 2019, and MTC has asserted that Cubic should agree to allow this credit to be applied to other projects in order to give MTC the benefit intended under the 2009 arrangement. Under the recommended settlement, MTC agrees to forego \$1,000,000 of the credit, and Cubic agrees to apply \$500,000 of the credit toward the cost of Clipper[®] Phase 3 integration for the East Bay and 101 Corridor transit operators and \$500,000 of the credit toward the cost of Clipper[®] integration for Sonoma-Marín Area Rail Transit.

A mutual release and waiver of claims by Cubic and MTC related to the above-described disputes is included in the settlement agreement.

Recommendation

Staff recommends that the Operations Committee authorize the Executive Director or his designee to negotiate and enter into a settlement and mutual release and waiver of claims with Cubic Transportation Systems, Inc., under which MTC will receive payment of \$119,664 and forego \$1,000,000 of a \$2,000,000 Clipper[®] Contract credit, and Cubic will withdraw a claim with an estimated value of \$1,000,000 per year, as described above.



Steve Heminger

SH: LV:ja

REQUEST FOR COMMITTEE APPROVAL

Clipper® Contract Claims Settlement – Clipper® Phase 3 Operating Costs, Uncollected Autoload Value, Credit/Debit Card Chargebacks, and Resolution of \$2,000,000 Credit from Assignment of Contract in 2009: Cubic Transportation Systems, Inc.

Work Item No.: 310-2700

Contractor: Cubic Transportation Systems, Inc.
Concord, CA

Project Title: Clipper® Contract Claim Settlement and Mutual Release and Waiver of Claims

Purpose: Resolution of disputes pertaining to Phase 3 operations and maintenance (O&M) expenses, uncollected Autoload value, credit/debit chargebacks, and \$2,000,000 credit from assignment of Clipper® Contract in 2009

Brief Description: Cubic will agree to withdraw its claim for additional O&M compensation for certain Phase 3 transit operators; Cubic will pay MTC \$102,664 for lost fare revenue from certain Autoload transactions between September 2010 and August 2011; Cubic will pay MTC \$17,000 for customer chargeback transactions that occurred between November 2010 and May 2011 where Cubic did not contest the chargeback transactions; MTC and Cubic will enter into a contract change order that clarifies Cubic's responsibilities for contesting chargebacks; and MTC will forego \$1,000,000 of a \$2,000,000 Contract credit intended for BART parking, while Cubic will apply \$1,000,000 of the credit to Phase 3 projects.

Estimated Project Cost: N/A (MTC will receive payment of \$119,664 and forego \$1,000,000 of a \$2,000,000 Clipper® Contract credit under the settlement agreement; transit operators will assume O&M costs estimated at approximately \$180,000/fiscal year)

Funding Source: Cubic, MTC and transit operators, as described in Executive Director's April 4, 2014 memorandum

Fiscal Impact: None

Motion by Committee: That the Executive Director or his designee is authorized to negotiate and enter into a settlement and mutual release and waiver of claims with Cubic Transportation Systems, Inc., for the purposes described herein and in the Executive Director's April 4, 2014 memorandum.

Operations Committee:

Jake Mackenzie, Chair

Approved:

Date: April 11, 2014